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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a claimant present a different theory of recovery when a claim is appealed into court (R.C. 4123.512)?

Certain conditions, such as chronic illnesses, are subject to classification as both an injury and an occupational disease. This can cause problems, because in certain respects, the Code treats these types of claims differently. Prior to 1996, and the adoption of the "universal" FROI-1, claimants were largely left to argue the theory of recovery listed on their application. While this is no longer the case, situations still arise where one theory is presented administratively, but the claimant wishes to present a new or alternate theory in a *de novo* appeal. Is the claimant limited to one theory of the case?

Steele v. Crawford Machine, Inc., 184 Ohio App3d 45, 2009-Ohio-2306, concerned a claimant who developed hand and wrist symptoms, allegedly arising from repetitive stress. She admitted having previous problems, and had undergone surgery, but her symptoms returned shortly after starting work with the employer. The claimant sought treatment with a physician, who diagnosed "bilateral carpal tunnel syndrome, bilateral tendinitis, and bilateral ganglion cysts." A claim was filed, which was disallowed by the BWC and at a DHO hearing, both of which referred to "injury or occupational disease." An SHO reversed and allowed the conditions, prompting the employer to file an appeal to the Crawford County Common Pleas Court Before commencing a bench trial, the employer sought to exclude the presentation of both theories of recovery at trial. Citing *Mull v. Jeep Corp*. (1983), 13 Ohio App.3d 426, the employer argued that the theories were separate and distinct, and that each would necessarily exclude the other. The claim was also allowed as an "occupational disease," so the employer argued that the employee should be limited to that theory at trial. The trial court denied the employer's motion, and after a trial allowed the claim for all of the requested conditions, prompting an appeal.

In a majority opinion, the Third District Court of Appeals affirmed, concluding that evidence indicated that both theories were presented administratively, so they could both be presented at trial. The Court stressed that appeals pursuant to R.C. 4123.512 are *de novo* proceedings, and that a claimant is not permitted to present completely new conditions or theories of recovery at trial. However, in reviewing the BWC notes and IC orders, it appeared that the claim was considered under both theories administratively. This distinguished the case from *Mull*, a heart attack case in which the employee sought to introduce new evidence and a completely different trial theory. In a dissent, Judge Rogers stated that the claim was allowed as an occupational disease claim, and the claimant should therefore be limited to that theory of recovery.

While this may be a straightforward decision in the context of these facts, the majority of workers' compensation appeals are tried to juries, not judges. Juries may not be so sophisticated as to understand the difference between an occupational disease and an injury, and there are

conditions (such as toxic exposure cases) where this distinction may result in different defenses or burdens of proof. Employers should be aware that permitting both theories to be considered administratively will likely result in a similar presentation in court.

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